2006

Town of Leeds Leeds v. Terry Prisbey : Brief of Appellant

Utah Court of Appeals

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3 Tues, Oct. 7
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IN THE UTAH COURT OF APPEALS

TOWN OF LEEDS, a Utah Municipal Corporation Plaintiff and Appellee Vs. TERRY PRISBREY, Defendant and Appellant	**Brief of Appellant** Case No. 20061085 - SC

Appeal from the ruling of the Honorable James L. Shumate, Fifth District Court, Washington County

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Jurisdictional Statement

This Court has jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j).

Issues on appeal

Appellant intends to assert the following issue on appeal: Did the trial court err as a matter of law in concluding that a roadway crossing Appellant's land had been dedicated and abandoned to the use of the public pursuant to Utah Code Ann. §72-5-104(1), given the Court's factual finding that Appellant's predecessor in interest had physically blocked the roadway for a 24 hour period and remained present at such blockade every seven years from the road's construction to the time of hearing.

Standard of review

Application of Utah Code Ann. § 72-5-104(1) must be supported by clear and convincing evidence, AWINC v. Simonsen 2005 UT App 168, ¶7, 112 P.3d 1228. Application of law under Utah Code Ann. § 72-5-104(1) is reviewed for correctness Id, at ¶8. However' in application of the facts to the statute, the trial court is granted

significant discretion, State v. Six Mile ranch Co. 2006 UT App 104, ¶9, 132 P.3d 687.

Determinative law

Utah Code Ann. § 72-5-104(1) governs the specific issue presented.

Statement of the Case

On February 23, 2006 the Town of Leeds filed a complaint asking that the court declare the roadway traversing Appellant's property had been abandoned to the public pursuant to UCA § 72-5-104(1). R 1-6. The matter was heard with testimony from relevant witnesses on motion for preliminary injunction March 28, 2006 (R 198) and continued with further hearing on May 4,2006. R 197. The Court made oral findings of fact at that time. R 197, transcript P. 211-213. After further briefing and argument on July 20, 2006 the court ruled from the bench that the road had been abandoned to public use. R 196, transcript p. 21-22. Pursuant to the stipulation of counsel, the evidentiary hearings were consolidated with (and considered as) trial on the merits. R 178-179, ¶7.

After the appearance of Appellant's current counsel, R 167, Findings of Fact and Conclusions of Law and Judgment were entered

October 27, 2006. R 173-179. Notice of Appeal was filed November 16, 2004. R 183.

Statement of Facts

Within the Town of Leeds there exists a roadway named West Center Street ("West Center Street") originating at an intersection with Main Street (Old Highway 91) and extending North to the crest of a small incline, then down hill across certain real property currently owned by the Defendant (the "Subject Property") to a narrow "Box" underpass underneath Interstate 15 to an area known as Angel Springs. Findings of Fact, R 176 ¶1. The roadway is 10 feet wide where it passes under the free way. R 198 Transcript p 8. The roadway after it ceases being center street (at least according to Appellant's position) as it crosses Appellant's property is at most 14 feet wide and at some places less than that. R 197 Transcript p 185.[1] The Box underpass was constructed at the same time that Interstate 15 was constructed in 1964-65 at which time West Center Street was repositioned to its present location. Findings of Fact, R 176 ¶2.

Mrs. Joann George and her family owned the Subject Property prior to Appellant's purchase in approximately 2000. Findings

[1] The record is not clear on the length of the roadway in question. Exhibit 7 is the only picture of the roadway. Appellant believes the portion crossing his property is approximately 600 feet long.

of Fact, R 176 ¶3. In October of every year for seven years, beginning in October of 1964, and again in October of 1971, 1978, 1985, 1992, and finally in 1999, Mrs. George, either solo or with the assistance of her sons, went to the roadway in question and established a roadblock for twenty-four hours. Findings of Fact, R 176 ¶4. The roadblocks generally consisted of her or her sons' physical presence and placement of sawhorses across the road. Findings of Fact, R 176 ¶5.

With the exception of the 24-hour roadblocks, from 1966 until 1996 this road was open, unblocked and available to the public without any inhibition of travel with possible exception of times during sorghum boiling[2] at a local processing plant near the road. Findings of Fact, R 176 ¶6. See also testimony of Joanne George R 197 transcript p. 162-166. Joanne George also testified that she placed "no trespassing" signs on the blockade. R 197, transcript p. 163.[3] The express reason for blocking the road was to retain ownership. R 197, transcript p. 169.[4]

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[2] Various witnesses testified that at times the "church" boiled sorghum on what is now appellant's property at various times during the years in question. Some witnesses opined that the road may have been closed to prevent dust.

[3] See addendum for copy of testimony.

[4] See addendum for copy of testimony.

During her 24-hour road blockades, Mrs. George (with the exception of an adjacent landowner[5]) never encountered anyone in the process and did not testify that she knew of anyone who was precluded from traveling along the road because of her blockades. Findings of Fact, R 176 ¶7. From 1966 through 1996, members of the public used West Center Street whenever they wished and without the need of obtaining permission. Findings of Fact, R 176 ¶8. Such use was light enough that it did not apparently coincide with the roadblocks.

After his purchase in 2000 and before the commencement of the action by Appellee (February 2006), Appellant attempted to restrict travel across the road by erecting a chain link fence across the road at the southernmost edge of the Subject Property and at the entrance into the "Box" tunnel. Findings of Fact, R 176 ¶9. Appellant also affixed two no trespassing signs on the chain link fence. Complaint R 1-6.

As a result of Defendant's actions, the Town of Leeds filed an action seeking to have West Center Street deemed a dedicated public right of way pursuant to Utah Code Ann. § 72-5-104(1), and

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[5] Elaine Cuff testified that she saw Mrs. George's blockade in 1999. R. 198 transcript p.27.

sought a temporary restraining order and injunction enjoining appellant from obstructing the roadway. Findings of Fact, R 176 ¶11.

Summary of Argument

The Trial Court made a clear factual finding that the owner of the roadway in question blocked the same for a 24-hour period every seven years from the road's creation to 1999 (the roadway was again blocked by Appellant after his purchase in 2000). Under the holdings of a series of Utah Supreme Court cases, because the road was blocked it was not in continuous use and not dedicated or abandoned to public use under UCA 72-5-104(1). Specifically, the approach of balancing the amount and scope of public use against the nature and length of closure under the recent case of Wasatch County v. Okelberry, 2006 UT App 473, 556 Utah Adv. Rep. 35 (Utah App. 2006), should be rejected.

Further, inferred intent of the land owner to abandon the roadway to public use is still a requirement to a finding of dedication of the roadway to public use. The owner's actions in closing the roadway every seven years to prevent such dedication, as a matter of law, preclude an inference of such intent.

Finally, the periodic closures and reopening of the roadway require the conclusion that the public use of the roadway was permissive. Because the use was permissive, it was not used as a "public thoroughfare" and no dedication to the public results.

Argument

The Public Use of the Roadway in Question Was Not Continuous.

Utah Code Ann. § 72-5-104(1) states, "A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years." The Utah Supreme Court, in Heber City v. Simpson, 942 P.2d 307, 310 (Utah 1997), reiterated the elements for a finding of public dedication under Utah Code Ann. § 72-5-104(1). [T]here must be (*i*) continuous use, (*ii*) as a public thoroughfare, (*iii*) for a period of ten years. Citing Boyer v. Clark, 326 P.2d 107, 311(Utah 1958), the Supreme Court explained that "continuous use" is found when "the public [makes] a continuous and uninterrupted use of the . . . [r]oad as they found it convenient and necessary. This Court has cited Heber City, Supra, and Boyer, supra for the same proposition. See Awinc v. Simpson, 2005 UT

App 168 at ¶11. In Department of Natural Resources v. Butler, 2006 UT App 444, this court by implication agreed that actually barring travel by the public prevents a finding of continuous use. In discussing the use of gates they stated:

> [T]he court held that the gates in question were generally unlocked from about 1925 until 1980 and were used merely to restrict the travel of livestock, not people. . . . We therefore agree with the trial court's conclusion that the Road was in continuous use by the public for an extended period of time.

Id. at ¶15. Appellant maintains that the Trial Court's finding that the roadway was blocked for a 24 hour period every seven years prevents the legal conclusion that the public's use was "continuous" for purposes of public dedication.[6] The standard rule for statutory construction was reiterated by the Utah Supreme Court in State v. Holms, 2006 Utah 31, held:

> "[O]ur primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." Foutz v. City of S. Jordan, 2004 UT 75, ¶ 11, 100 P.3d 1171 (internal quotation marks omitted). "We presume that the legislature used each word advisedly

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[6] The only Utah Supreme Court case that could possibly suggest that barring the roadway would not prevent a finding of continuous use is Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981), where the court noted that the road had "periodically been blocked to facilitate the movement of sheep. Unlike the present case there was apparently no finding of when the roadway was blocked during the more than 20 years of testified use. Also, the blocking the road to move sheep has no implications to intent or acquiescence in the dedication. For argument regarding the intent of the owner in blocking the roadway, see infra.

and give effect to each term according to its ordinary and accepted meaning." C.T. v. Johnson, 1999 UT 35, ¶ 9, 977 P.2d 479 (internal quotation marks omitted),

Id. at ¶16. The plain ordinary meaning of the term "continuous use" is use without interruption.[7] Appellant acknowledges that to be continuous the use need not be constant. Indeed even the most heavily traveled roadway may have periods of time where no one passes. However to be continuous it must not be interrupted. In Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct App. 1998), this court summarized the test for continuous use as previously set forth by the Utah Supreme Court:

> In *Boyer v. Clark,* 7 Utah 2d 395, 326 P.2d 107 (Utah 1958), the supreme court concluded there had been continuous and uninterrupted use of a road over ten years where "the public, even though not consisting of a great many persons, made a continuous and uninterrupted use ... as often as they found it convenient or necessary." *Id.* at 109. Similarly, in *Richards v. Pines Ranch, Inc.,* 559 P.2d 948 (Utah 1977), the supreme court stated that, "use may be continuous though not constant .... *provided it occurred as often as the claimant had occasion or chose to pass.* Mere intermission is not interruption." *Id.* at 949 (emphasis added) (citation omitted). Finally, in *Heber City Corp.,* 942 P.2d at 311, the supreme court found continuous use of a road where the evidence at trial demonstrated that the public "made a continuous and uninterrupted use of the road "as often as they found it convenient or necessary."
>
> Under Utah law, use need not be regular to be continuous. Even infrequent use can result in dedication of a road as a public thoroughfare. However, *under the continuous use requirement, members of the public must have been able to use the road whenever they found it necessary or convenient,*

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[7] Continuous, 1: marked by uninterrupted extension in space, time, or sequence, Merriam-Webster's online dictionary.

Id, at 809. Emphasis added second paragraph

In Richards *v. Pines* Ranch Inc., 559 P.2d 948 (Utah 1977) which was cited by this court as authority for the definition of continuous use, Campbell, at 809, the Utah Supreme Court adopted the standard set forth in 1 Thompson on Real Property, Specific Easement, Section 464, p. 575 (1924) as follows:

> A way may be established by prescription without direct evidence of its actual use during each year. A use may be continuous though not constant. A right of way means a right to pass over another's land, more or less frequently, according to the nature of the use to be made by the easement; and how frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass. *It must appear not to have been interrupted by the owner of the land across which the right is exercised*, nor voluntarily abandoned by the claimant. Mere intermission is not interruption.

Campbell, at 949, emphasis added.

During the closures of the roadway in this case, the use was interrupted as the public could not have used the road during periods of closure had they found it convenient and necessary to do so and for a period of time their "right to pass" over the roadway was indeed interrupted by the owner. Under the authority cited above, it is not just actual interference with particular members of the public attempting to use the roadway but closure of the roadway itself that prevents dedication under UCA § 72-5-104(1). Whether members of

the public attempted to use the roadway in question during a closure would be merely a matter of coincidence.

However, in Wasatch County v. Okelberry, 2006 UT App 473, 556 Utah Adv. Rep. 35 for the first time this court held, that:

> In deciding whether a locked gate acted as an interruptive force sufficient to restart the running of the statutory ten-year period, the trial court should weigh the evidence regarding the duration and frequency that the gate was locked against the frequency and volume of public use to determine if there is clear and convincing evidence that public use of the road was continuous.

Id. at ¶18, Petition for Certiorari to the Utah Supreme Court pending.[8] Appellant joins the Okelberry petitioners believing the holding in Okelberry should be abandoned.

In reaching this holding the Okelberry court treats the question of whether the use of the roadway is interrupted as a sliding scale, yet provides no rod for measurement. One would presume that under such a balancing test more than half of the actual use of the public would have to be stopped in order for a conclusion of an "interruptive force sufficient to restart the running of the statutory ten-year period." Nevertheless the Court provides no time frame during which such interruption is to occur. Must half (or at least some significant but unknown percentage) of all actual traffic be stopped during any given ten year period? During an actual closure, such as

[8] See addendum Utah Supreme Court Docket regarding the petition.

the 24 hour period as specifically found by the trial court, 100 percent of all possible traffic was prevented. During the closures the roadway the public was not "*able to use the road whenever they found it necessary or convenient*" Campbell, at 809 hence the use was interrupted and not continuous.

The Okelberry court appears to also hold that it is incumbent upon the landowner to prove interruption of use by testimony of members of the public who were actually prevented from traveling on the roadway. It should be immaterial whether the road closures made by Appellant's predecessor in interest actually interrupted the travel of particular members of the public. To hold members of the public need have been actually halted in the act of traveling as opposed to the roadway itself being closed to use, results in the illogical conclusion that a lightly traveled road is harder to "interrupt" than one with more frequent use. It would indeed be incongruous to hold that it is the roadway's being open to public use which results in dedication even though the use itself is "infrequent" and does "not consis[t] of a great many persons," Boyer, at 109, yet for a closure to be an "interruption" it must meet a quantitative test of sufficient duration and frequency.

The Okelberry court cites a number of cases[9] for the proposition that whether a roadway was blocked or gates were used, locked or unlocked, were mere factors in concluding whether use of a roadway was interrupted, Okelberry, at ¶15. This is true as far weighing evidence regarding the use of gates or blockages. None of the cases, however, stand for the proposition that once a trial court makes a factual finding that a roadway was indeed closed to the public, the duration and frequency of such closure must also be weighed against the amount of the actual interruption to use. It is respectfully suggested that the Okelberry court confuses a trial court's discretion in weighing evidence and testimony before reaching factual conclusions and the legal conclusions based on factual findings once made.

Appellant also respectfully suggests that the Okelberry Court has departed from the plain language of the statute and the precedent as set forth above. Once the trial court found the roadway was closed to the public for a 24-hour period every seven years during

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[9] The cases are: Campbell v. Box Elder County, 962 P.2d 806, 809 (Utah Ct. App. 1998); Thurman v. Byram, 626 P.2d 447, 449 (Utah 1981); Thomson v. Condas, 27 Utah 2d 129, 493 P.2d 639, 640-41 (Utah 1972); Gillmor v. Carter, 15 Utah 2d 280, 391 P.2d 426, 427 (Utah 1964); Wilhelm v. Pine Meadows Estates, Inc., 2001 UT App 285U, No. 20000559-CA, 2001 Utah App. LEXIS 131, at *3-*4 (Oct. 4, 2001) (per curiam)

the relevant time period it was compelled as a matter of law to conclude that it had not been "continuously used as a public thoroughfare for a period of ten years" and hence, was not dedicated and abandoned to the public pursuant to UCA §72-5-104(1).

In deciding whether to keep the Okelberry balancing test or return to the precedent set forth above it is incumbent to keep in mind:

> The law does not lightly allow the transfer of property from private to public use. The public's taking of property in such circumstances as this case presents requires proof of dedication by clear and convincing evidence. *Thomson v. Condas,* 27 Utah 2d 129, 130, 493 P.2d 639, 639 (1972); *Petersen v. Combe,* 20 Utah 2d 376, 377--78, 438 P.2d 545, 548 (1968). This higher standard of proof is demanded since the ownership of property should be granted a high degree of sanctity and respect. *Petersen,* 438 P.2d at 548--49 (Crockett, C.J., dissenting),

Draper City v. Estate of Bernardo, 888 P.2d 1097, 1099, (Utah 1995). The Okelberry approach in effect places a high burden upon a property owner. Once testimony is presented that the road was used by members of the public, (again, even though the use itself is "infrequent" and does "not consis[t] of a great many persons," Boyer, at 109), the burden then shifts to the landowner to prove not just that the road was closed but that the closure was sufficient to outweigh the remaining public use. As even recognized by the Okelberry Court:

> [W]e note the difficulty property owners face in locating disinterested witnesses to testify that they were prevented from using the roads at their convenience or the time of their choosing because they met with a locked gate or were turned away,

Okelberry, at ¶17. Such testimony may be of events decades past and be required to come from adverse witnesses with no motivation to come forward with testimony that would prevent their use of a putative public roadway. Again, Appellant does not suggest that a trial court does not have discretion to weigh all testimony of use of the roadway and weigh it against testimony that the roadway was closed on one or more occasions. However, once a trial court finds the roadway was closed to public use, as a matter of law that should prevent a finding that the roadway was "continuously used" under UCA 72-5-104(1) in spite of such closure. As a practical matter the balancing approach announced in Okelberry promotes and favors, not the preservation of private property, but the transfer of private property to public use.

Public interest also compels abandonment of the Okelberry holding. If indeed it is incumbent on a landowner to show closure of the roadway in question sufficient to successfully "weigh . . . against the frequency and volume of public use," Okelberry, at ¶188, landowners will have no choice but to close all public access to their

property or run the risk that they will not be able to meet the Okelberry test in a future action.[10] The public will lose the use of private roadways and land owners will lose the ability to open their roadways to the public for such reasons as they may deem best to themselves for periods of less than ten years. Indeed in petitioning for leave to file an amicus brief in the Okelberry's petition for certiorari to the Utah Supreme Court, Brigham Young University raises similar public policy concerns.[11]

Implied Intent to Abandon the Roadway to the Public is Still Required

Historically intent of the landowner was required for a roadway to be abandoned to the public. In Morris v. Blunt, 161 P. 1127 (Utah 1916), the Utah supreme Court held:

> A dedication rests primarily in the intent of the owner. There must be a concession intentionally made by him, which may be proved by declarations or acts, or may be inferred from the circumstances. No form or ceremony is necessary. It must, however, appear that he knew of the use by the public, and intended to grant the right of way to the public,

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[10] Indeed the Trial Court suggested to Appellant that his predecessor in interest should have permanently closed the roadway to prevent creation of a public thoroughfare. R 196 at transcript p. 21.

[11] See attached "Motion for Leave to File an Amicus Curiae Brief in Support of Petitioners," dismissed as premature pending granting or denial of Okelberry's Petition for Certiorari.

Id. at 1130. At that time the statute in question, Compiled Laws of Utah 1907 § 1115 provided:

> A highway shall be deemed to have been dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years,

Id at 1130.

In Gillmore v. Carter, 351 P.2d 426 (Utah 1964) the Utah Supreme Court again held quoting Morris, "there must be evidence of intent by the owner to dedicate a road to public use . . ." Id at 428. In Thurman v. Byrum, 626 P.2d 447 (Utah 1981) the Court clarified the intent requirement holding:

> It is not necessary to prove the owner's intent to offer the road to the public as contended by defendants. Section 27--12--89[12] deems a dedication to the public as a matter of law when the required public use is established. See *Wilson v. Hull*, 7 Utah 90, 92, 24 P. 799, 800 (1890), where we said: *"The intention of the owner of the land to dedicate may be inferred from his acquiescence in its continual use as a road by the public."* This language was quoted with approval in *Schettler v. Lynch,* 23 Utah 305, 64 P. 955 (1901),

Id, at 449, emphasis added. While the actual mental state of the owner need not be proved under Thurman, an inferred intent from acquiescence in the continual use by the public was still required. This holding was quoted in part in Bertagnole v. Pine Meadows Ranches, 639 P. 2d 211, 213 (Utah 1981) to rebut the contention of a

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[12] Compiled Laws of Utah 1907 § 1115 was renumbered to UCA 27-12-89.

land owner that his "mere acquiescence" in the public use did not establish his intent to abandon the roadway to the public. The Bertangnole court in quoting Thurman, stated "[t]here is no need to prove the landowner's intent" They did not however hold that intent no longer needed to be inferred from the "acquiescence in the continual use of the road by the public." That inferred intent is still a requirement is demonstrated by the Utah Supreme Court's return to the full Thurman language in Draper City v. Estate of Bernardo, 888 P.2d 1097 (Utah 1995) wherein they held:

> It is not necessary to prove that the owner of the private road had the intent to offer the road to the public. *Thurman v. Byram,* 626 P.2d 447, 449 (Utah 1981). Rather, under section 27--12--89, *the owner's intent may be inferred by the mere acquiescence in allowing the public to use the road. Id.; Leo M. Bertagnole, Inc. v. Pine Meadow Ranches,* 639 P.2d 211, 213 (Utah 1981),

Id at 1099, emphasis added, citing Bertagnole for the same proposition. It must be conceded that the Utah Supreme Court did, in Heber City Corp. V. Simpson, 942 P.2d 307, 311 in quoting Morris, supra, state:

> We have subsequently abandoned interpreting into the language of the statute the requirement that the owner must consent to the dedication. *Draper City,* 888 P.2d at 1099 (citing *Leo M. Bertagnole, Inc. v. Pine Meadow Ranches, 639 P.2d 211,* 213 (Utah 1981); *Thurman v. Byram, 626 P.2d 447,* 449 (Utah 1981)).

The Court nevertheless remains committed to the holding in Draper City as evidenced by the citation. Proving actual consent or actual intent is a higher standard than allowing intent to be merely inferred from the inactions of the land owner. It is this higher proof that is no longer required (if it ever was) for a finding of public dedication. It remains Utah law that the actions of the owner in acquiescing to the public's use of the roadway must be such to allow the inference of intent to abandon and dedicate the roadway to public use.

There may certainly be cases where the owner subjectively wishes to keep the road private (or perhaps has given the matter no thought) but nevertheless whose actions or inactions have resulted in public use sufficient to compel a finding of inferred intent to abandon a roadway to public use. In this case, however, the Trial Court specifically found that the owner in question had blocked the road every seven years for a 24 hour period. Findings of Fact, R 176 ¶¶3&4. Further, it is clear from the record that she did so with the specific intent of keeping the road private. R 197, transcript p. 169.[13] The Trial Court's factual finding that the roadway had been blocked for 24 hours every 7 years by the owner does not allow a conclusion that the

[13] See addendum for transcript.

previous owner had acquiesced in the public's use of the roadway and hence the required intent cannot be inferred.

The landowner's Closing and Reopening of the Roadway Requires the Conclusion that the Public's use was Permissive.

In addition to "continuous use for a period of ten years", for a roadway to become public under UCA 72-5-14(1) such use must also be as a "public thoroughfare":

> It is firmly established under Utah law that permissive use cannot result in either adverse possession or dedication of private property to the public. *See, e.g., Heber City Corp.,* 942 P.2d at 311--12; *Thurman v. Byram,* 626 P.2d 447, 449--50 (Utah 1981),

Campbell v. Box Elder County, 962 P.2d 806, at 809 (Utah App. 1998). The Campbell Court upheld the Trial Court's conclusion that opening the roadway to the public and closing it again justified a finding that the resulting public use was permissive and could not result in dedication of the roadway to the public.

In State v. Six Mile Ranch Co., 2006 UT App 104, this court recognized the holding in Campbell stating:

> The trial court properly relied upon Campbell for the proposition that an overt act, such as locking and unlocking a gate, provides evidence of permissive use,

Id. at ¶23. In the case at bar, the Trial court made the express factual finding that the previous owner, Mrs. George, had blocked the

roadway every seven years for a 24 hour period. The express reason of blocking the road was to retain ownership. R 197, transcript p. 169. Because of Mrs. George's express and uncontroverted acts in closing and opening the roadway, as a matter of law, the members of the public which used the road did so with her implied permission. As a result it was not used as a "public thoroughfare" and no dedication to the public was made.

Conclusion

Given the Trial Court's factual finding that the roadway in question was blocked for a 24 hour period, and given the fact that it is undisputed that such action was taken specifically to prevent dedication of the roadway to the public, Appellant requests the following relief:

1) A holding that as a matter of law there was not a continuous use of the roadway for 10 years, as defined under Utah law;

2) A holding that intent to abandon the roadway is still required under Utah law and such intent cannot be inferred from the land owner's actions;

3) A holding that the land owners' actions compel a finding that the public's use of the roadway was permissive and that such use was not as a "public thoroughfare" preventing the legal conclusion that the roadway was dedicated to the public use; and,

4) That the case be reversed and remanded to the Trial Court to enter Judgment in favor of Appellant.

DATED AND SIGNED this 15th day March 2007.

Jeff Peatross
Ranney and Peatross
Attorneys for Defendant and Appellant Prisbrey

CERTIFICATE OF MAILING

I hereby certify that the attached **Brief of Appellant** was mailed, postage prepaid, this 15th day of March, 2007 to the following:

Bryan J. Pattison
192 E. 200 N. Third Floor
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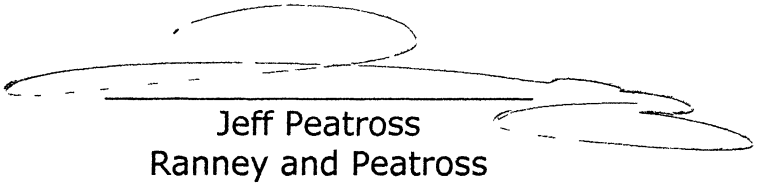
DATED AND SIGNED this 15th day of March 2007.



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Addendum

1. Findings of Fact and conclusions of Law

2. Judgment

3. Utah Supreme Court Docket Search [Okelberry]

4. Transcript Excerpts: R 197 pp 162,163 and 169

5. Brigham Young University: Motion to file amicus [Okelberry]

Findings of Fact and conclusions of Law

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TOWN OF LEEDS, a Utah municipal corporation Plaintiff, vs. TERRY PRISBREY, an individual: DEFENDANT DOES and all other persons or entities unknown claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding their title thereto, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No.: 060500408 Judge: James L. Shumate

The above-captioned parties, present in person and by legal counsel came on before the Court on the 20th day of July, 2006 at the hour of 1:30 p.m. for the conclusion of a temporary restraining order hearing which first commenced on March 28, 2006 and was continued in the form of an evidentiary hearing on May 4, 2006. Having considered the testimonial, documentary and other evidence and the argument of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Within the Town of Leeds there exists a roadway named West Center Street ("West Center Street") originating at an intersection with Main Street (Old Highway 91) and extending North to the crest of a small incline and then down hill across certain real property currently owned by the Defendant (the "Subject Property") to a narrow "Box" underpass underneath Interstate 15 to an area known as Angel Springs.

2. The Box underpass was constructed at the same time that Interstate 15 was constructed in 1964-65 at which time West Center Street was repositioned to its present location.

3. Mrs. Joann George and her family owned the Subject Property prior to Defendant's purchase in approximately 2000.

4. In October of every year for seven years, beginning in October of 1964, and again in October of 71, 78, 85, 92, and finally in 99, that Mrs. George either solo, or with the assistance of her sons, went to the road [West Center Street] in question and at the peak of the road, which is on Exhibit No. 7, the juncture of a "Y," established a roadblock for twenty-four hours, and she guarded that road in that fashion every seven years for twenty-four hours.

5. The roadblocks generally consisted of her or her sons' physical presence and placing sawhorses across the road.

6. That from the testimony of Mr. Sullivan, Mr. Beal, Mr. Peine, Mr. Lott, Mr. Goddard, and Chief Lewis that from 1966 until 1996 this road was open, unblocked

with the exception of the 24-hour roadblocks, and available to the public without any inhibition of travel with possible exception of times during sorghum boiling.

7. During her 24-hour road blockades, Mrs. George never encountered anyone in the process and cannot testify that she knew of anyone who was precluded from traveling along the road because of her blockades.

8. From 1966 through 1996, members of the public used West Center Street whenever they found it necessary and/or convenient and without the need of obtaining permission.

9. Recently, the Defendant, who claims West Center Street is a private road, has attempted to restrict travel across the same by erecting a chain link fence across the road at the southernmost edge of the Subject Property and at the entrance into the "Box" tunnel.

10. Defendant also affixed two no trespassing signs on the chain link fence.

11. As a result of Defendant's actions, the Town of Leeds filed this action seeking to have West Center Street deemed a dedicated public right of way pursuant to § 72-5-104(1). and sought a temporary restraining order and injunction enjoining Defendant from obstructing West Center Street and destroying any portion thereof, and specifically requiring Defendant to remove the gates and signage constructed across the road.

Based on these findings of fact, the court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. This is an action by Plaintiff, the Town of Leeds, to have West Center deemed a dedicated public right of way pursuant to Utah Code Ann. § 72-5-104(1), which provides that "A highway is dedicated and abandoned to the use of the public when it has been continuously used as a public thoroughfare for a period of ten years."

2. Three factors must be present for a road to become a public highway by dedication under Section 72-5-104(1): (i) continuous use (ii) as a public thoroughfare (iii) for a period of ten years.

3. Members of the public traveled West Center Street from 1966 to 1996 as often as they found it convenient or necessary, at times chosen by them and, therefore, the public's use of West Center Street was continuous during that period of time.

4. From 1966 to 1996, there was not sufficient action taken to adequately put the public on notice either that permission was needed to use West Center Street nor was there sufficient action taken by Mrs. George to obstruct the public's free and unrestricted passing and travel on West Center Street; therefore West Center Street was as a public thoroughfare.

5. The continuous use of West Center Street as a public thoroughfare was made for a period of ten years (1966 to 1996).

6. Based on clear and convincing evidence provided to the Court, West Center Street is a dedicated public road pursuant to Utah Code Ann. § 72-5-104(1).

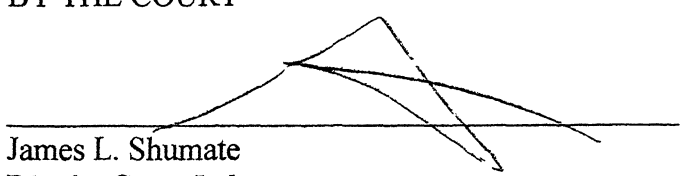
7. Because the parties, through counsel, stipulated that the evidentiary hearings and argument on the temporary restraining order and preliminary injunction should be consolidated

with the trial of the action on the merits, and because the Court finds clear and convincing evidence that the West Center Street is a dedicated public road pursuant to Utah Code Ann. § 72-5-104(1), judgment is hereby entered in favor of the Town of Leeds that West Center Street is a dedicated public right of way.

8. Defendant is hereby ordered to remove any obstruction and signage constructed across West Center Street and is permanently enjoined from taking any further action to block or otherwise inhibit vehicular or pedestrian traffic from traveling on West Center Street.

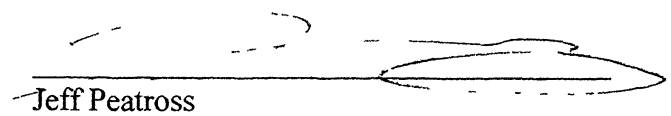
SO ENTERED this 27 day of October 2006.

BY THE COURT



James L. Shumate
District Court Judge

Approved as to Form:
RANNEY & PEATROSS



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Judgment

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IN THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY, STATE OF UTAH

TOWN OF LEEDS, a Utah municipal corporation Plaintiff, vs. TERRY PRISBREY, an individual: DEFENDANT DOES and all other persons or entities unknown claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding their title thereto, Defendants.	**JUDGMENT** (Declaratory Judgment & Injunctive Relief) Civil No.: 060500408 Judge: James L. Shumate

The above-captioned parties, present in person and by legal counsel came on before the Court on the 20th day of July, 2006 at the hour of 1:30 p.m. for the conclusion of a temporary restraining order hearing which first commenced on March 28, 2006 and was continued in the form of an evidentiary hearing on May 4, 2006. Having considered the testimonial, documentary and other evidence and the argument of counsel and having the made separate Findings of Fact and Conclusions of Law which are entered concurrently herewith, and for good cause showing:

IT IS HEREBY ORDERED ADJUDGED AND DECREED that judgment is hereby entered in favor of the Plaintiff, the Town of Leeds, that the historic right of way commonly known as West Center Street is a dedicated public right of way pursuant to Utah Code Ann. § 72-5-104(1). That a certified copy of this Judgment may be recorded in the Official Records of Washington County maintained in the Office of the Recorder, Washington County, State of Utah.

IT IS FURTHER HEREBY ORDERED ADJUDGED AND DECREED that Defendant, Terry Prisbrey, and all agents, successors and assigns are hereby permanently enjoined from taking any action to block or otherwise inhibit vehicular or pedestrian traffic along West Center Street.

SO ORDERED this 27 day of Oct, 2006

BY THE COURT

James L. Shumate
District Court Judge

Utah Supreme Court Docket Search [Okelberry]

Appellate Docket Search

Docket Information Case - 20070011

Utah Supreme Court

Title: Wasatch v. Okelberry

Docket No: 20070011 Docket Date: 01/02/2007
Agency: FOURTH DISTRICT, HEBER DEPT Case: 010500388
Status: Petition Filed

Date	Action	Disposition	Date
01/02/2007	Writ of Certiorari Filed		
01/04/2007	Receipt for Payment		
01/17/2007	Substitution of Counsel		
02/02/2007	Response to Writ		
02/07/2007	Reply to Response to Petition		
02/09/2007	Motion to Accept Amicus Curiae	Denied	02/14/2007
02/14/2007	Motion to Accept Amicus Denied		
01/01/3000	Review of Case Due	Due	03/05/2007

Transcript Excerpts: R 197 pp 162,163 and 169

either two by eight or two by ten from the old mills when they really were two by tens, and we put them across. But there was really not a problem because the only one going over would be Uncle Max or Uncle Willard or -- not Uncle Willard. He has passed on. Uncle Max and his family, and there were some others, but we had no trouble at that time.

THE COURT: Where did you place the obstructions?

THE WITNESS: Right -- it's hard to see the elevation here, but I am presuming that that would be the high mark right there.

THE COURT: At the peak of the elevation right at the top of the hill?

THE WITNESS: Yes, the peak of the elevation.

THE COURT: So you could see it from either side?

THE WITNESS: Either side.

THE COURT: Okay.

THE WITNESS: I only --

THE COURT: How many two by tens were used; do you remember?

THE WITNESS: Pardon me?

THE COURT: How many two by tens were used?

THE WITNESS: I think only one. Who wanted to carry more than that?

THE COURT: And a couple of saw horses, one on each end? Was there any kind of sign placed on it?

THE WITNESS: Just "no trespassing."

THE COURT: Okay.

THE WITNESS: Somewhat weathered.

THE COURT: And you would have put that there in September of 1964?

THE WITNESS: (Non-verbal response)

THE COURT: How long was it there?

THE WITNESS: Until we took it down 24 hours later.

THE COURT: Okay.

THE WITNESS: Actually, we didn't know we didn't have to be there. My two sons and I spelled one another off through the night. In some ways it was -- they thought it was quite exciting.

THE COURT: Your purpose, then, was to block the road --

THE WITNESS: For a full 24 hours.

THE COURT: Stand guard duty, as it were?

THE WITNESS: Oh, yes.

THE COURT: Even though you didn't know you didn't have to. Okay. That's all right. Sometimes we do silly things.

THE WITNESS: After that I returned with my family August 14th, 1971, and the boys and I again -- the boys were hoping to be taken deer hunting by someone. They weren't. We spent that night the day of the evening before deer hunt. Everyone had buck fever. No one --

THE COURT: I think you said August, but you must have

A. In 1999 I was right there.

Q. Okay.

THE COURT: At the bottom of the hill right in the mouth of the culvert, Counsel.

THE WITNESS: That's right, with my arms folded.

Q. BY MR. HEIDEMAN: When you were performing this sentry duty did you believe that the City of Leeds had obtained ownership to the property?

A. No.

Q. Okay.

A. I felt -- I don't know that law that well, Mr. Heideman, but according to our family tradition as long as we blocked it we remained the owners. We certainly were paying the taxes on it.

Q. Do you continue or did you continue to pay the taxes until the property was transferred to another owner?

A. Yes, paid the taxes until it was sold to Mr. Prisbrey.

Q. With regard to the sorghum factory, are you aware of the existence of that factory?

A. More like an old mill.

Q. Okay. Sorghum old mill. With regard to that, there was some testimony that that sorghum -- am I saying that correctly, your Honor?

THE COURT: G-u-m, counsel. There is no "r" on that side of the "g."

MR. HEIDEMAN: Thank you, your Honor.

Brigham Young University: Motion to file amicus [Okelberry]

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IN THE SUPREME COURT

OF THE STATE OF UTAH

WASATCH COUNTY, Appellant and Respondent, vs. E. RAY OKELBERRY, et. al., Appellees and Petitioners.	**MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS** Supreme Court No. 20070011 Court of Appeals No. 20050389

Brigham Young University (BYU) moves this Court for an order allowing BYU to file an amicus curiae brief in support of petitioners in this case.

BYU has an interest in this case because it owns private property within the state of Utah with private roads that connect to public highways. For example, several roads across BYU's Provo campus begin and end beyond BYU's private property and are potentially subject to abandonment and dedication under Utah Code Annotated § 72-5-104(1). BYU desires a predictable and clear rule, easily applicable ex ante, that determines when roads across private property become abandoned and dedicated public highways.

An amicus brief is desirable in this case to explain how the decision of the Court of Appeals will affect private property owners in urban and suburban areas. The Court of Appeals instructed trial courts to "weigh the evidence regarding duration and frequency that the gate was locked against the frequency and volume of public use" to establish abandonment. *Wasatch County v. Okelberry*, 2006 UT App 473, ¶ 18. Particularly in high-traffic areas, such as around BYU's Provo campus, infusing variables of traffic frequency and volume into the statutory analysis will only complicate the inquiry of whether the road "has been continuously used." Utah Code Ann. § 72-5-104(1). A private property owner will be unable, by fencing or gating roads periodically during the 10-year abandonment time frame, to ensure that its private roads are not abandoned to the public. This is particularly the case if trial courts have wide latitude in determining whether public use is permissive.

An amicus brief is also desirable to demonstrate potential unintended consequences of the balancing test set forth by the Court of Appeals. Private property owners, without the guidance of a bright-line rule that allows both for public use and for protection of private property rights, will need to increasingly restrict, or totally exclude, the public from their roads in order to protect their property rights.

DATED this 9th day of February, 2007.

MICHAEL R. ORME
Attorney for Brigham Young University